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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Respondent,

-vs-

PETER GOTTHEINER,

Petitioner.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

NO. 81-1554

PETITION FOR CERTIORARI

WILLIAM J. MURPHY, ESQ.
333 West Portal Avenue, Suite A
San Francisco, California 94127
Telephone: (415) 665-7600

ATTORNEY FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the Department of Justice prosecutor in this case, Mr. Barry Goldman from Washington, D.C., was sufficiently authorized to conduct legal proceedings in the Northern District of California under Title 28, United States Code, Section 515(a).

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JURISDICTIONAL BASIS

Petitioner's conviction on making false statements to a governmental agency in violation of 18 U.S.C. §1001 and of making a false application for a bank loan in violation of 18 U.S.C. §1014 was affirmed by the Ninth Circuit Court of Appeals on August 18, 1982, which date the judgment was entered.

Petitioner's petition for rehearing was denied on September 27, 1982.

Petitioner's motion to stay Issuance of Mandate was denied November 15, 1982.

The jurisdictional basis for this petition for writ of certiorari is found in Title 28, United States Code, §1254 (1), which states:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods"
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Although the various Circuits of the United States Courts of Appeals have

grappled with and decided the issue and question presented in the petition, this Court should settle this important issue of federal law.

REFERENCE TO REPORTS BELOW

In a memorandum opinion filed August 18, 1982, the United States Court of Appeals for the Ninth Circuit affirmed petitioner's conviction. The memorandum is set out in the appendix.

STATUTES INVOLVED

18 U.S.C. §515(a) (1976):

> (a) "The Attorney General or any officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought."

18 U.S.C. §1001(1976);

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. §1014 (1976) provides in relevant part;

> "Whoever knowingly makes any false statement or report, for the purpose of influencing... any bank the deposits of which are insured by the Federal Deposit Insurance Corporation,... shall be fined not more than $5,000. or imprisoned not more than two years, or both".

Fed R. Crim. P. 6(d);

> "Attorneys for the government, the witnesses under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

Fed R. Crim. P. 54(c) states in relevant part;

> "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney...".

STATEMENT OF THE CASE

Appellant PETER GOTTHEINER was convicted of three counts of 18 U.S.C. §1001 (False Statement) and one count of 18 U.S.C. §1014 (False Application) The violations occurred while defendant was purportedly president of Visting Home Services, Inc. (VHS). VHS contracted with numerous counties in California and elsewhere to provide homemaker services to elderly and disabled persons so they would be able to remain living at home rather than in nursing or convalescent homes. The program was funded under Title XX of the Social Security Act (HEW) with the federal government providing 75% of the costs.

The conviction was based on a $250,000 promissory note executed by Ralph Gomez, who was also involved in the operation of the business and was worth over $16,000.000. It was appellant's information and belief that Ralph Gomez at the time of execution of said note was sufficiently solvent to honor it. It was the government's contention that

the note was uncollectible from its inception, and was included on the financial books of VHS merely to facilitate the awarding of contracts to VHS.

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,

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-vs-

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---

28 U.S.C. §515(a) the government compliance of which petitioner challenges here, states in relevant part;

> "The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law,

> may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings . . . which United States Attorneys are authorized by law to conduct. . . 28 U.S.C. §515(a).

Upon proper authorization, one so authorized becomes an "Attorney for the government" as defined in Rule 54(c) of the Federal Rules of Criminal Procedure, thereby enabling the attorney to be present before the grand jury while it is in session under Rule 6(d) of the Federal Rules of Criminal Procedure.

Special Assistant United States Attorney Barry D. Goldman found his way into the grand jury rooms and courtrooms of the District Court of the Northern District of California as a result of a letter sent to him by the Criminal Division of the United States Justice Department. [Appendix 9]. The letter stated in part that Goldman was "Authorized and directed to . . . conduct in the Northern District of California and any other judicial district any kind of legal proceedings, civil or criminal, including grand jury proceedings..... which

United States Attorneys are authorized to conduct." Petitioner Gottheiner contends that this letter was insufficient to make Goldman an "authorized attorney" for the government under Fed. Rule Crim. Pro 6(d) which was required to justify Goldman's presence before the grand jury.

Numerous Circuits of the United States Court of Appeals have grappled and decided cases involving such 28 U.S.C. 515(a) letters of authorization, however, the broad, unbridled grant of authority given to Prosecutor Goldman represents the ultimate in Carte Blanche power ever given to an attorney of the United States Department of Justice. The Ninth Circuit Court of Appeals apparantly considered the grant acceptable under the laws of the United States in affirming petitioner's conviction. It is petitioner's view in submitting this writ that this is such an important question of federal law that it is imperative that this Court settle the issue.

The primary cases that petitioner has chosen to present his argument and illustrate his point are the following; Infelice v. United States 528 F. 2d 204 (7th Cir. 1975); In Re Persico 522 F2d 41 (8th Cir. 1975); United States v. Dulski 528 F 2d 204 (7th Cir. 1975); United States v. Morris 532 F. 2d 436 (5th Cir. 1976); United States v. Prueitt 540 F. 2d 995 (9th Cir. 1976); and United States v. Wrigley 520 F 2d 362 (8th Cir. 1975). Other cases that also define the question presented are included.

In Re Persico, supra, painstakingly traced the development of the statute in question, 28 U.S.C. §515(a), from its wordage, legislative history, and court construction. Although Persico and the other above cited cases all upheld letters of authorization and ruled in favor of the Government the fact remains that the particular letter in Petitioner's case is by far the broadest ever written and relied upon by a Department of Justice presecutor, Strike Force or otherwise.

In Persico the commission given the special attorney by the Justice Department contained information as to what the special attorney was "specifically directed" to do. The letter read:

> "The Department is informed that there have occurred and are occurring in the Eastern District of New York . . . violations of federal criminal statutes by persons . . . unknown to the Department at this time." Persico, supra at 45

Most importantly, the court in Persico opined as to the letter;

> "The commission states the attorney's authority in broad and general terms". Persico, supra at 45.

This is important since the court there considered the Persico letter and upheld it even though stating it was broad and general. However, Goldman's letter is far broader than the one in Persico and it is unlikely the Persico court would consider the letter in the instant case sufficient.

As stated above, the Persico court went to great lengths to set out the legislative history of 28 U.S.C. 515(a), which originated with the "Act of June 30, 1906, 34 Stat. 816".

The Act enabled special attorneys to conduct legal proceedings, including grand jury proceedings,"when specifically directed by the Attorney General". Although petitioner concedes here that no specific mention be made of any particular statutes being violated in such authorization letter, the letter authorizing Goldman to conduct legal proceedings in the Northern District of California, "or any other judicial district" does not meet the "specific direction" requirement of 28 U.S.C. §515(a).

The letter of authorization appointing the Strike Force attorney to the prosecution in Persico read as follows;

November 30, 1972

"Dear Mr. Del Grosso:

"The Department is informed that there have occurred and are occurring in the Eastern District of New York and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.

"As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the

Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

"Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.

"You are to serve without compensation other than the compensation you are now receiving under existing appointment.

"Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.

"Sincerely,

(signed) HENRY E. PETERSON
Assistant Attorney General"

The Persico court indeed did uphold the commission granted to the prosecutor in that case, however, it is obvious that the letter authorizing Goldman to conduct legal proceedings in "any other judicial district" is far

broader than said commission in Persico. Goldman's letter of authorization reads in its entirety;

> Mr. Barry D. Goldman
> Criminal Division
> Department of Justice
> Washington, D.C. 20530
>
> Dear Mr. Goldman:
>
> As an attorney for the Government employed full time by the Department of Justice and assigned to the Criminal Division, you are hereby authorized and directed to file informations and to conduct in the Northern District of California and any other judicial district any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before United States Magistrates, which United States Attorneys are authorized to conduct.
>
> You may file a copy of this letter with the Clerk of the District Court to evidence this authorization.
>
> Sincerely,
>
> Philip B. Heymann
> Assistant Attorney General
> Criminal Division
>
> By: John C. Keeney
> Deputy Assistant Attorney General

The Persico court noted that the underlying fear of such broad grants of power to outside attorneys was not of a broad commission but of an uncontrolled prosecution force.

The prosecutor involved in petitioner's conviction, Barry Goldman, was given the broad license to conduct legal proceedings in any federal district in the United States.

This commission letter creates precisely the situation that the Court feared in Persico, along with other cases that have addressed 28 U.S.C. §515(a) compliance. Infelice v. United States 528 F2d 204 (7th Cir. 1975) and its companion case, United States v. Dulski also considered and approved far more specific letters than the one at issue here. Petitioner also points to United States v. Morris 532 F2d 436 (5th Cir. 1976) and United States v. Wrigley 520 F 2d 360 (8th Cir. 1975) as examples of far more specific grants of authority under 28 U.S.C. §515(a).

The final case, United States v. Prueitt 540 F 2d 995 (9th Cir. 1976) took place in the Ninth Circuit Court of Appeals, whom petitioner's conviction was affirmed by. The commission letter in Prueitt stated;

"As an attorney and counselor at law you are hereby specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the case or cases growing out of the transactions hereinafter mentioned in which the Government is interested. In that connection you are specifically directed to file informations and to conduct in the Southern District of California and in any other judicial district where the jurisdiction thereof lies any kind of legal proceeding civil or criminal, including grand jury proceedings, and proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct.

The department is informed that various persons, companies, corporations, firms, associations, and organizations to the Department unknown have violated in the above-named district and in other judicial districts the Controlled Substances Act and the Controlled Substances Import and Export Act (21 U.S.C. 801-966) and other criminal laws of United States and have conspired to commit all such offenses in violation of Section 371 of Title 18 of the United States Code." (emphasis added). United States v. Prueitt, supra at 1000.

As is clear from the Prueitt letter, the Justice Department was aware that violations of the Controlled Substances Act were going on not only in the Southern District of California but in other judicial districts as well. Indeed, in defen-

dant Prueitt's case federal agents found Los Angeles as well as San Diego sectional air charts for use in smuggling marijuana from Mexico. Id at 999. Prueitt could have just as easily been arrested in the Central District of California as well as in the Southern District where he was arrested and indicted. Also, the prosecutor was specifically directed to "assist in the trial of the case or cases growing out of the transactions hereinafter mentioned in which the government is interested". Narcotics smuggling is such an inherently transient crime that such language was needed in the authorization letter for the prosecutor to be effective. To not include it would perhaps have been fatal to the government's efforts to halt drug smuggling.

Thus, the Prueitt case is quite different than petitioner's case since the phrase "and in any other judicial district" was there for a specific purpose. To emphasize one important point here, the Prueitt court

considered the letter there "general for the most part", yet was swayed by the mention of the specific statutes involved. Id at 1003.

Petitioner directs this Court's attention to the dissenting opinion in Prueitt by them - Judge Hufstedler, and urges this Court to consider and her view as the proper one. Hufstedler opined;

> "Nor can the appearance of an unauthorized person before a grand jury be dismissed as a technicality. The authority to present cases to a federal grand jury carries with it solemn responsibilities both to the public and to persons who may be brought before it. The process can result in an indictment that throws the might of the Government against the individual, be he innocent or guilty. The conduct of the process is secret. Secrecy is designed to protect the process itself as well as to protect witnesses and the innocent accused. (Citation omitted). The presence of an unauthorized person before the grand jury impairs secrecy. Because grand jury proceedings can be used to intimidate as well as to protect, their conduct is hedged with restrictions. One of those important restrictions is the requirement that only authorized persons are permitted to present cases to a grand jury. It is immaterial that a person who was indicted by a grand jury tainted by the presence of an unauthorized prosecutor would also

have been indicted by the same grand jury free from that taint. The taint blights the process itself, and thus diminishes regard for the administration of justice. We can no more disregard this infirmity than we could dismiss as harmless an adjudication by a judge who was statutorily disqualified from hearing a case. In both instances, the stake is the integrity of the administration of justice, and the existence of prejudice to a defendant is irrelevant". United States v. Prueitt, supra at 1006 (J. Hufstedler, dissenting).

Petitioner urges this Court to examine the case law cited above and draw the line here regarding such a roving commission that was given to Prosecutor Goldman in this case.

DATED: November 18, 1982

WILLIAM J. MURPHY

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 81-1554
v.	)	DC No. CR-81-007
PETER GOTTHEINER, Defendant-Appellant	)	MEMORANDUM (FILED 8-18-82)

Appeal from the United States District Court for the Northern District of California Lloyd H. Burke, District Judge, Presiding
Argued and Submitted July 13, 1982

Before: CHOY, SNEED, and FARRIS, Circuit Judges.

Gottheiner was convicted by a jury of making false statements to a government agency in violation of 18 U.S.C. §1001 and of making a false application for a bank loan in violation of 18 U.S.C. § 1014. He appeals his conviction claiming that certain defects in the indictment procedure, in the trial judge's admission of evidence, and in the deliberations and polling of the jury require reversal. Because we find that

Gottheiner's grounds for appeal are without merit, we affirm his conviction.

I. Indictment Procedure

Gottheiner challenges the validity of the indictment underlying his conviction on three grounds. First, he contends that the Justice Department's letter authorizing Barry Goldman, one of its attorneys, to conduct the grand jury proceeding was not sufficiently specific to satisfy the requirements of 28 U.S.C. §515(a) and thus Goldman was not properly authorized to obtain the indictment. For Goldman's authorization to have been proper §515(a) requires that he must have been "specifically directed by the Attorney General" to conduct the grand jury proceeding (emphasis added). We hold that although Goldman's authorization was phrased in general terms, it was precise enough to satisfy the specific direction requirement of §515(a). Our holding is supported by decisions of this and other circuits finding that letters of authorization containing similarly-broad language were sufficient

to satisfy §515(a). See United States v. Prueitt, 540 F 2d 995 (9th Cir. 1976), cert. denied, 429 U.S. 1063 (1977); Infelice v. United States, 528 F 2d (7th Cir. 1975); and United States v. Morris, 532 F. 2d 436 (5th Cir. 1976).

Second Gottheiner contends that the prosecutor's failure to instruct the grand jury that knowledge or intent is an essential element of an 18 U.S.C. § 1001 offense warrants dismissal of the indictment. We disagree. This circuit has held that where the indictment is valid on its face, legal instructions from the prosecutor to the grand jury are not required at all. United States v. Kenny 645 F 2d 1323, 1347 (9th Cir.), cert. denied, 452 U.S. 920 (1981). The indictment returned by the grand jury here not only tracks the language of the statute, but contains the appropriate allegations of intent and is clearly valid on its face. The validity of the indictment on its face alone is sufficient to call for a trial on the merits. Costello

v. United States 350 U.S. 359, 363 (1956). Although it may have been desirable for the prosecutor to instruct the grand jury more carefully on the requisite knowledge or intent, his failure to do so does not provide a ground for dismissing the indictment.

Gottheiner's third contention is that the delay of nearly five years between his alleged illegal acts and his indictment prejudiced his right to a fair trial because it deprived him of the testimony of a potential witness. In order to prove that pre-indictment delay requires dismissal of an indictment, a defendant must first show actual, nonspeculative prejudice resulting from the delay. United States v. Stone, 633 F. 2d 1272, 1274, (9th Cir. 1979). This Gottheiner has failed to do. His allegation that the witness' testimony would have been exculpatory is speculative, lacking any significant evidentiary support.

II. Trial Proceedings

Gottheiner also directly challenges the validity of his conviction of two grounds. First, he contends that the admission of witness Ellen Rowley's testimony that Gottheiner had been informed of the fraudulent nature of the January 1976 financial statements was unduly prejudicial and necessitated the declaration of a mistrial. Under Rule 403 of the Federal Rules of Evidence, the trial judge is given discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." The trial judge's determination of whether to exclude evidence under Rule 403 is given great deference and may only be reversed upon a showing that the trial judge abused his or her discretion. United States v. Larios, 640 F 2d 938, 941 (9th Cir. 1981). Because we can discern no unfair prejudice in the admission of Rowley's testimony, we hold that it was properly admitted by the trial judge.

Gottheiner's final contention is that a mistrial should have been declared because the jury foreman pressured jurors in their deliberations by refusing to allow them to communicate directly with the judge, and because the jurors were unaware that they could change their vote during the polling of the jury. In support of his claim, Gottheiner submitted affidavits of two jurors who stated that they believed they could not communicate directly with the judge; that they had wished to inform the judge that the jury was deadlocked since they believed Gottheiner was innocent; that the jury foreman pressured them by refusing to relay their message of the deadlock to the judge or to permit the jury to go out deadlocked; that they were unaware that they could have changed their vote during the polling process; and that they would have changed their vote to "not guilty" had they known they could.

In general, jurors may not impeach their verdict. Traver v. Meshriy, 627 F 2d

934, 941 (9th Cir. 1980). This rule is codified in Rule 606(b) of the Federal Rules of Evidence which prohibits jurors from testifying on the validity of their verdict except with respect to questions of extraneous prujudicial information made known to them or outside influence brought to bear on them. The two jurors' allegation that the jury foreman pressured them by refusing to allow them to communicate directly with the judge does not fall within the Rule 606(b) exceptions and cannot properly be considered as evidence of impeachment. See United States v. Barber, 668 F 2d 778, 786-87 (4th Cir. 1982). Moreover, even if the allegation were considered and accepted as true, it would not be sufficient to justify reversing the conviction.

Gottheiner's reliance on the jurors' second allegation that they were unaware that they could change their vote during polling is also misplaced. The jury was properly polled in open court by the judge

and each juror affirmed the verdict. This court has stated that "once a verdict has been delivered and accepted in open court, and the jury is polled and discharged, jurors may not claim that their assent was mistaken or unwilling." Traver v. Meshriy supra, 627 F 2d at 941; see United States v. Weiner, 578 F 2d 757, 764 (9th Cir.), cert. denied, 439, U.S. 981 (1978). The jurors' second allegation thus does not provide a proper basis for impeaching the verdict.

For the foregoing reasons, Gottheiner's conviction is AFFIRMED.

UNITED STATES DEPARTMENT OF JUSTICE
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
WASHINGTON, D.C. 20530

Mr. Barry D. Goldman
Criminal Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Goldman:

As an attorney for the Government employed full time by the Department of Justice and assigned to the Criminal Division, you are hereby authorized and directed to file informations and to conduct in the Northern District of California and any other judicial district any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before United States Magistrates, which United States Attorneys are authorized to conduct.

You may file a copy of this letter with the Clerk of the District Court to evidence this authorization.

Sincerely,

Philip B. Heymann
Assistant Attorney General
Criminal Division

By: John C. Keeney
Deputy Assistant Attorney General
(Pursuant to Order No. 725-77, dated May 12, 1977)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PETER GOTTHEINER, Defendant-Appellant.	No. 81-1554 DC #CR-81-007 ORDER (FILED 9-27-82)

Before: CHOY, SNEED and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	NO. 81-1554
vs.	)	ORDER
PETER GOTTHEINER, Defendant-Appellant.	)	(FILED 11-15-82)

Before: CHOY, SNEED and FARRIS, Circuit Judges.

Appellant's motion to stay issuance of mandate is denied.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Certiorari was mailed postage prepaid to:

Robert G. Clark
United States Department of Justice
P.O. Box 136
Ben Franklin Station
Washington, D.C. 20044-0136

on this 18th day of November, 1982.

KEVIN C. McDONOUGH